Michigan Law Review

Volume 56 | Issue 4

1958

Schwartz: The Supreme Court: Constitutional Revolution in Retrospect

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RECENT BOOKS

THE SUPREME COURT: CONSTITUTIONAL REVOLUTION IN RETROSPECT. By *Bernard Schwartz*. New York: The Ronald Press Co. 1957. Pp. vii, 429. $6.50.

It is apparent to any student of the subject that our constitutional law has undergone an extensive overhauling during the past twenty years, and it is accurate to say that we have experienced a period of constitutional revolution via the peaceful method of the judicial process. Professor Schwartz in his excellent book has undertaken an appraisal of this development. Chapter by chapter he reviews the major decisions and developments during the period under review in all the important areas of constitutional adjudication. But while the book provides an accurate and well organized picture of the course of the decisional law, the author has been concerned also to depict the major emphases and trends, the direction in which judicial review is moving, and in turn to state his own appraisal of these emphases and trends. It is a very useful and stimulating part of Professor Schwartz's book that he subjects decisions and opinions to critical examination and states his own views in a straightforward way.

Two major facets of our constitutional development as reflected in the decisional process in the recent decades have been, first, the expanded interpretation of the Commerce Clause power in order to enlarge the range of the federal government's legislative authority in dealing with the nation's economic problems and, secondly, the reduced significance, if not complete elimination, of the Due Process Clause as a source of substantive rights in restricting the power of Congress and of the states to deal with economic affairs. On the whole, Professor Schwartz approves of these two major developments since they reflect the policy of judicial self-restraint and deference to the legislative body which he regards as vital to the process of judicial review in the sphere of constitutional litigation. (Pp. 10-38, 367-372) It is apparent that Professor Schwartz subscribes to the Holmes-Frankfurter theory of judicial austerity, i.e., that the courts in deference to legislative power and policy should refrain from declaring legislation unconstitutional as long as the Court finds that the legislative scheme does not lack rationality. Indeed Professor Schwartz states that judicial review is essentially undemocratic in character, that the Court by very nature will lag behind public opinion and that judicial review accordingly should be sparingly exercised in deference to the democratic process. (Pp. 7-10, 370-372) He regards the Commerce Clause interpretations and the decline of substantive due process at least in its economic liberty connotations as desirable manifestations of the kind of judicial self-restraint which he believes to be imperative. Moreover, Professor Schwartz regards these recent lines of decisions which have enlarged the Commerce Clause and drained the Due Process Clause of much of its earlier meaning as a healthful and desirable return to earlier lines of authority which

evidenced the same type of judicial restraint which the Court is now displaying. Whether or not Professor Schwartz is correct in his assertion that the Court is merely restoring its earlier correct positions depends of course on presuppositions as to the point in time when the correct practice was found. That John Marshall's thinking expressed in *McCulloch v. Maryland*,[1] and *Gibbons v. Ogden*[2] should serve as a pattern for the operation of the judicial process in construing congressional powers is readily understandable. But what was the initially correct position on the interpretation of the Due Process Clause of the Fourteenth Amendment as a restraint on the power of the states? No easy answer suggests itself.

To say that Professor Schwartz approves of major developments that evidence considerable judicial self-restraint in the review of legislative acts is not to say that Professor Schwartz is uncritical of the Supreme Court's decisions during the recent decades. On the contrary, he evidences on the whole a conservative approach to constitutional interpretation and is concerned that the Court exercise its proper function in our judicial system. The point he stresses is that the Court concern itself with questions of constitutional power and that it not confuse questions of power with questions of wise policy. The Court should not sit as a super-legislative body. The author's overall position appears to be that the Court should not invalidate legislation unless it either violates an express prohibition of the Constitution or unless it is an unreasonable exercise of legislative power. (P. 59) But the Court should not confuse "reasonableness" with "rightness." (P. 310) Moreover, the judges of the Supreme Court should not make their own conceptions of values the standards of constitutional interpretation. It may be noted for instance that the author is critical of the idea expressed in a number of Supreme Court opinions during the 1940-1950 decade to the effect that the First Amendment freedoms have a preferred place in our constitutional scheme of things. (Pp. 231-240, 311-312) He rejects this conception that appears to him to place a high value on First Amendment freedoms as the kind of judicial subjectivity that led the Court astray in an earlier day. He agrees with Justice Frankfurter that judges have no business saying that some constitutional limitations are more important than others. Elevation of free speech to a position of primary importance is as much an abuse of judicial authority as the earlier judicial attempts to place economic liberty on a high pedestal. (Pp. 237-238)

In accordance with this same philosophy he is critical of the type of individualism that has distinguished the Court in recent years. He regards the great plethora of separate opinions—dissenting and concurring—as a factor weakening the Court's prestige and impairing its effectiveness and

1 4 Wheat. (17 U.S.) 316 (1819).
2 9 Wheat. (22 U.S.) 1 (1824).

dignity as a collegiate body. (Pp. 354-362) Dissenting opinions in Professor Schwartz's view should be written only under very special circumstances where the expression of a separate opinion will be a positive contribution to the development of the law, and even then the privilege of dissent should be exercised with a sense of responsibility and self-restraint. (Pp. 360-362) Moreover, in the interest of stability the Court should be slow to overrule well established precedents, and the rule of stare decisis should be generally observed by the Court in the field of constitutional adjudication except when it is clear that prior decisions rested on an erroneous exercise of judicial power.[3] Accordingly, Professor Schwartz has little patience with the Black-Douglas attempt to revive the questions whether corporations are protected under the Fourteenth Amendment (Pp. 350-351) or whether the Fourteenth Amendment should be equated with the Bill of Rights as distinguished from the classic interpretation in terms of fundamental rights. (Pp. 163-167) Respecting Justice Black's dissenting opinion in the *Adamson* case,[4] Professor Schwartz questions the propriety of Justice Black's resting his conclusions on his own interpretation of history when this whole question of historical intent was not briefed or argued before the Court and did not receive full consideration by all the members of the Court at that time.

Space does not permit any detailed review of Professor Schwartz's comments on all the specific cases he discusses in the course of his various chapters. He reviews the judicial decisions relating to the powers of Congress, the powers of the President, administrative agencies, the place of the courts, the states, the individual, the war power, the cold war, and concludes with a chapter entitled "Anatomy and Pathology of the Court," the chapter in which he discusses stare decisis in constitutional adjudication, activism, dissenting opinions (*Dissentio ad Absurdum*), liberalism vs. conservatism on the bench, and the general subject of judicial deference to the legislative will. The reader will find the chapters provocative and rewarding. Although a detailed review will not be attempted, attention will be called to some of his criticisms and comments as set forth below in order to give the reader some idea of the book's flavor and the author's thinking.

While it must be recognized that Congress under the Commerce Clause has a broad power of regulation over the nation's economy, it is questionable whether this power should be so widely construed by applying

[3] The author approves of the Court's post-1937 overruling of prior decisions restricting the reach of congressional power under the Commerce Clause and limiting federal and state legislative power to deal with economic problems by reference to the economic liberty concept developed under the Due Process Clause, since in his opinion these decisions represented an overreaching of the judicial power at the expense of legislative power to deal with new situations and marked a departure from the earlier and correct policy of judicial deference to legislative judgment in policy-making areas.

[4] Adamson v. California, 332 U.S. 46 (1947).

a theory of interrelation of all economic activities that the distinction between national and local commerce is completely obliterated. (P. 39) The Court's decision in the *Kahriger* case[5] in effect permits Congress to make a spurious use of the taxing power as a means of regulating criminal activity that should be left to the states. (Pp. 51-53) The congressional investigatory power is important, and the Supreme Court should be very slow to interfere with the internal function of a coordinate branch of the government. (Pp. 53-57) (It would be interesting to get Professor Schwartz's comments on the recent *Watkins* case[6] holding invalid contempt convictions based on refusal to answer questions put by a congressional committee.)

According to the author, the Court has shown undue deference to the executive authority. (Pp. 64-70) The steel seizure decision[7] is approved as a desirable affirmation of judicial power to curb the executive in order to maintain the supremacy of Congress in the determination of legislative policy. (Pp. 76-81, 94) The Court has shown extreme tolerance in dealing with executive power so far as the handling of foreign affairs is concerned. Professor Schwartz points out that the Court went out of its way in the *Belmont* and *Pink* cases[8] to broaden the legal significance of executive agreements and to elevate these agreements to the level of treaties in overriding state law and policy. (Pp. 86-93) Because he feels that it is in the sphere of executive review of administrative action that the courts have a very useful function to perform, Professor Schwartz, after observing that Congress in recent years has granted authority to administrative agencies in such broad terms that for all practical purpose it amounts to the granting of carte blanche power to these agencies to define policy, notes with apparent regret that the Court has virtually repudiated the idea that Congress cannot delegate its power without setting up some meaningful standards which serve as barriers to the aggrandizement of administrative authority. (Pp. 102-108) The author is also critical of the attitude taken by the post-1937 Court in deference to administrative agencies and its resulting reluctance to review the actions of these agencies. (Pp. 108-120) Judicial deference to the legislature does not require the courts "to leave everything to the administrative expert." (P. 139) Professor Schwartz is enthusiastic about the Administrative Procedure Act, is glad that the courts have given it a sympathetic interpretation and is hopeful that they will continue to do so in the interest of furnishing a more effective vehicle of judicial review that will limit the opportunities for the arbitrary exercise of administrative authority. (Pp. 120-139)

[5] United States v. Kahriger, 345 U.S. 22 (1953).
[6] Watkins v. United States, 354 U.S. 178 (1957).
[7] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
[8] United States v. Belmont, 301 U.S. 324 (1937); United States v. Pink, 315 U.S. 203 (1942).

In his chapter entitled "The Individual," the author, while rejecting the idea that the First Amendment freedoms are preferred and while commending the Court for the more recent rejection of this idea (Pp. 231-240), examines and approves the decisions invalidating restrictions on Jehovah's Witnesses (Pp. 240-245), criticizes the *Struthers* decision[9] as a doctrinaire application of the First Amendment freedoms without taking into account the importance of preserving the privacy of the home (Pp. 248-249), approves the later decisions which have restored state control over picketing as against the *Thornhill* doctrine[10] that this was protected free speech (Pp. 250-253), approves the application of the free press limitation to the movies and feels that movies should not be subject to prior restraint any more than any other medium of expression (Pp. 253-257), and rejects the absolute application of the separation-of-church-and-state concept but disapproves of the result in the *Zorach* case.[11] (Pp. 256-263) So far as equal protection of the Negro is concerned, the author is clear that under the post-Civil War amendments race furnishes no basis for classification and that the recent decisions including the desegregation decisions must be supported as a proper performance by the Court of its duty to enforce constitutional limitations. (Pp. 263-275)

Legislative efforts to combat the subversive activity come in for consideration in the chapter on the cold war period. The *Dennis* decision[12] is approved as another instance of judicial deference in an area where the judgment of Congress on the need and desirability of restrictions must be given great weight. (Pp. 308-319) Attacking the procedures used in the loyalty-security program relating to federal employees, procedures which permit the use of "faceless" informers and which can be justified only by reference to the discredited dogma that public employment is a privilege and not a right, the author regrets that the Court has not used its most recent opportunities to condemn these procedures on the ground that they violate constitutional right. (Pp. 323-329) However, the decision in the *Cole* case[13] resting on statutory grounds, has contributed to the end result of developing a more equitable and effective program. (Pp. 329-331) The decisions permitting the use of confidential information in the selective service and deportation cases are characterized as administrative law distortions that reflect upon our traditions of fair play. (Pp. 331-335) In his comments on the *Rosenberg* case,[14] the author, while not doubting the justice of the end result, asserts that the Supreme Court acted with undue haste in its handling of the matter. (Pp. 335-341)

It is not possible within the limits of this review to pass judgment on

[9] Martin v. City of Struthers, 319 U.S. 141 (1943).
[10] Thornhill v. Alabama, 310 U.S. 88 (1940).
[11] Zorach v. Clauson, 343 U.S. 306 (1952).
[12] Dennis v. United States, 341 U.S. 494 (1951).
[13] Cole v. Young, 351 U.S. 536 (1956).
[14] Rosenberg v. United States, 346 U.S. 273 (1953).

Professor Schwartz's conclusions on the various matters including those mentioned above. It is enough to say that his book evidences an astute understanding of the development of our constitutional case law during the past two decades, that his discussion is well organized and that his comments are always penetrating, illuminating and interesting. Perhaps the favorable impression made on the reviewer by the book is due to the fact that he shares many of the author's conclusions.

By way of general comment it should be noted that Professor Schwartz probably is somewhat premature in announcing that the Court is now following an overall policy of self-restraint. Indeed, it may be assumed in the light of the Court's overall performance that the degree of self-restraint exercised by it will vary from time to time depending on the Court's personnel. The decisions announced during the past term of the Court, as presently constituted under Chief Justice Warren, evidence considerable "activism" as opposed to self-restraint. One may note, for instance, the decision in the *Watkins* case,[15] resulting in a substantial practical limitation on the power of congressional committees to ask questions, the decisions denying to Congress the power to authorize military trials for civilian dependents accompanying members of the armed forces abroad,[16] and the decision in the *Yates* case[17] which while not formally resting on constitutional grounds has the practical effect of undermining the *Dennis* decision. These decisions hardly evidence a policy of judicial austerity premised on deference to congressional power and policy.

Secondly, the problem of the judicial function in respect to adjudication of constitutional issues cannot be resolved in the neat and clear-cut manner indicated by Professor Schwartz's formula. He would have the Court declare legislation invalid only if it conflicts with specific limitations or is an unreasonable exercise of power in the Holmesian sense.[18] (P. 59) Yet the judicial solution to constitutional questions by reference to these two standards as guides to the judicial process is not simple; it requires the exercise of judgment and calls for a balancing of the ends served by legislative policy as against the rights that are claimed to be violated. Judicial enforcement of "specific restraints" is a more complex task

15 Watkins v. United States, 354 U.S. 178 (1957).

16 Reid v. Covert, Kinsella v. Krueger, 354 U.S. 1 (1957).

17 Yates v. United States, 354 U.S. 298 (1957).

18 At several points the author seems to make clear that in his opinion it is appropriate for the Court to review the "reasonableness" of legislation in the sense of inquiring whether there is some rational basis for the legislation. On the other hand, he seems to approve what he regards as the Court's present policy of self-restraint pursuant to which it will uphold legislation unless it "patently violates an express constitutional provision." (P. 23) Judicial review of the "reasonableness" of legislation obviously involves a wider power of review than that limited to the inquiry whether the legislation violates a specific constitutional limitation. The difference between the two is indicated by the difference between Justice Roberts' opinion in Nebbia v. New York, 291 U.S. 502 (1934), and Justice Black's opinion in Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949).

than the word "specific" suggests. Explicit constitutional limitations assume various degrees of specificity. The right to a jury trial can be given a very specific content by reference to the common law definition of the institution. On the other hand, the First Amendment limitations, often characterized as specific restraints when contrasted with the generality of the Due Process Clause, open up large vistas of meaning and interpretation. Does obscene literature enjoy protection under the First Amendment and to what extent may Congress use its powers under the Commerce Clause to curb the distribution of this kind of literature? It is quite clear that in answering these questions the Court must appraise and weigh opposing interests of considerable importance. Does deference to legislative judgment or does judicial concern for the value embodied in the specific restraint control the decision?

Likewise, judicial review of the "reasonableness" of the exercise of legislative power calls for a pragmatic balance-of-interest judgment that must of necessity take some account of the wisdom, necessity and justice of legislative policy. Nor is it conclusive to use Holmes' reasonable man test, i.e., would a rational man say that this is a reasonable way to deal with the problem? Even this test involves a considerable measure of judicial subjectivity. Who is to determine the thinking of the rational man? He is an abstraction, and in the end the judge creates an image of the rational man by reference to the judge's own conception of rationality. In other words when a judge says that a rational man would regard a given legislative act as reasonable, he is really saying that the judge finds that rational arguments can be made to support the objectives of the legislation and the means employed to effectuate these objectives. This is of course far different from saying that the judge thinks that the legislation is desirable or right. On the other hand, the inquiry into reasonableness is meaningless unless it penetrates to the grounds that lead the legislature to conclude that this is wise, desirable and just legislation.[19] At this point the judge is thrown upon his own resources and the frame of reference within which he operates. Judges may therefore disagree on the rationality of legislation. The difference between the Holmes and Brandeis opinions in

[19] At one point the author appears to recognize that a review of reasonableness of legislation involves some judgment as to the desirability of the legislation. "In applying a test as vague and indefinite as the above—i.e., is the statute unreasonable, unnecessary and arbitrary?—the Court was, in effect, determining upon its own judgment whether particular legislation was desirable." (P. 14)

It appears to this reviewer that the author in developing this particular point has overstated the matter when he says that the Court prior to 1937 had set itself up "as Supreme Censor of the wisdom of challenged legislation." (P. 23) It may appear to the author that the Court in passing on the "reasonableness" of legislation must necessarily have been passing on the wisdom of the statute, but this reviewer doubts that any justice of the Court would ever assert or defend the proposition that it was the Court's function to serve as a super-legislature in passing final judgment on the wisdom of legislative policy.

the *Pennsylvania Coal Company* case[20] well illustrates this point, since in this case two judges of great wisdom differed on whether a rational man would regard the Pennsylvania legislation under review as a reasonable way to deal with the problem of land subsidence induced by extraction of minerals.

The reviewer has no quarrel with the test of "reasonableness." Reflecting as it does the balance-of-interest technique in the process of constitutional adjudication, it appears to the reviewer to be a more meaningful approach than one couched in the language of absolutism or doctrinal conceptualism. The point he is making is that "reasonableness" as a standard for the operation of the judicial process is not to be equated with a mechanical objectivity. On the contrary, it calls for a determination by the judge by reference to his own lights, his understanding and appraisal of the interests at stake, and the basic frame of values that condition his intellectual process.

Likewise it appears to the reviewer that Professor Schwartz in attempting to objectify the process of constitutional adjudication by insisting on the impropriety of judicial appraisal of values is putting himself in a position where he appears to be an advocate of a mechanistic process of judgment in constitutional adjudication. The factors leading him to protest constitutional value appraisals by the judges are understandable. His criticism of the thesis that the First Amendment freedoms are preferred freedoms is well taken. Such a dogmatic statement is in itself a mechanical approach to the values and interests served by the First Amendment. Furthermore, Professor Schwartz is concerned with the divisiveness, individualism, and subjectivity that result when each judge interprets the Constitution in such a way as to make it an image of his own sense of constitutional values. The reviewer shares this concern too. But the reviewer cannot conceive of any rational process of constitutional adjudication in which the judge's conception of the values and interests served by the constitutional system, and their relevancy and importance in the context of our contemporary political, social and economic order, can be eliminated from the decisional process.

Professor Schwartz's own comments respecting many of the Court's decisions are based on his conception of important interests served by the Constitution and by his choice of the predominant interest that should govern the resolution of the problem presented by the case. One may note, for instance, his disapproval (Pp. 262-263) of the decision in the *Zorach* case[21] sustaining the validity of the New York system of released time. Here the immediate issue is whether a system which permits the release on a voluntary basis of school children at the expense of one hour per week of public school time for the purpose of religious education

[20] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).
[21] Zorach v. Clauson, 343 U.S. 306 (1952).

deprives any person of life, liberty or property without due process of law. A judicial policy which defers to legislative judgment respecting the wisdom and desirability of this practice and which limits the judicial inquiry to the question whether a rational man would regard this practice as a reasonable means of reconciling the claims to personal liberty with the public's interest in opportunities for religious education points to the result reached in the *Zorach* case. But if it is argued that the real question is whether this practice violates the separation-of-church-and-state concept derived from the First Amendment, it should be observed that the incorporation of the First Amendment into the Fourteenth Amendment itself represents a judicial determination that the First Amendment restrictions are essential to a system of ordered justice and are fundamental in character. This determination in itself represents an important judicial choice of basic values. In turn the significance of the separation concept in its application to the released time problem calls for a considerable exercise of judicial judgment in identifying, appraising and weighing the competing interests at stake. If Professor Schwartz thinks that the released time system should be held unconstitutional, it is because he has made his choice of the relevant constitutional value that should control the disposition of the case.

The author recognizes that judges do and should draw upon a sense of natural justice that finds its inspiration in the conscience and basic human feelings. (Pp. 170-171) On this ground he defends the Supreme Court's interpretation of due process in terms of fundamental or natural rights and takes issue with Justice Black's criticism as expressed in his dissent in the *Adamson* case[22] that the fundamental rights interpretation leaves constitutional questions at the mercy of uncontrolled judicial subjectivity. Answering this criticism, Professor Schwartz states that the judge "can be expected both to be keenly perceptive to violations of basic canons of justice and to be sufficiently detached to avoid imposing his purely personal notions, not shared by other men, upon society." (P. 171) Although this appears to the reviewer to be a good answer, it must still be conceded that the judge's sensitivity to basic human values, as crystallized in his own thinking and understanding, becomes a vehicle of constitutional interpretation.

But granted that the value (or policy) judgment is inevitably a part of the judicial process, Professor Schwartz is on solid ground in contending that the judicial judgment must be a disciplined and responsible judgment and not simply a reflection of personal idiosyncrasies or predilections. Respect for the testimony of history in illuminating and authenticating the meaning of constitutional language, for the principles and traditions established by past decisions, for the institutional role of the judiciary and the stability and steadfastness essential to the maintenance of public con-

[22] Adamson v. California, 332 U.S. 46 (1947).

fidence in the judicial arm of the government, for the underlying policy and structural objectives of the Constitution, for the rule of law and the values implicit in the concept of ordered justice—all these, coupled with wholesome respect for the pivotal position of the democratic political process and the institutions of representative government in the formulation of social and economic policies, are controlling and restraining forces which serve to correct excessive judicial subjectivity.

The reader will have reached the conclusion by this time that Professor Schwartz's latest book not only presents an able analysis and synthesis of the Supreme Court's decisions during the past two decades in the important areas of constitutional law, but also yields critical and illuminating observations on the judicial process at work in constitutional litigation. This is a good book and one that can be recommended not only for lawyers, law teachers and students, but also for the lay reader who has a sober and reflective interest in the new directions taken by our constitutional law and the role of the Supreme Court in the process of constitutional adjudication.

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